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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 13 1996

In the Matter of)

Section 257 Proceeding to)
Identify and Eliminate Market Entry)
Barriers for Small Businesses)

GN Docket No. 96-113

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission - Mail Stop 1170

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COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION

1. The Community Broadcasters Association ("CBA") hereby submits these Comments in response to the Commission's *Notice of Inquiry* ("NOI") in the above-captioned proceeding.^{1/} CBA is the trade association of the nation's low power television ("LPTV") stations. It conducts various activities on behalf of the LPTV industry and represents the interests of that industry in public policy forums. CBA urges the Commission, as it implements Section 257 of the Telecommunications Act of 1996, to refocus its small business attention away from trying to help new players find money to engage in billion dollar competitive bidding for spectrum and in the direction of assisting the truly "small" businesses that are independently owned and operated and not dominant in their field.^{2/} LPTV stations are the classic case of small business enterprises under this definition, and they dramatically fulfill the purposes of the Small Business Act, much more so than competitive bidders who are funded by large,

^{1/} FCC 96-216, released May 21, 1996. The Commission extended the time for comments to August 23, 1996, in an *Order*, DA 96-1100, released July 9, 1996.

^{2/} These are two of the three criteria for a "small business concern" as defined in the Small Business Act, 15 U.S.C. §632. The third criterion is "any additional criteria established by the Small Business Administration" ("SBA").

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established corporations, often foreign-owned. The Commission's regulatory record, while it has included some steps to help LPTV, has on the whole made it very difficult for LPTV stations to survive, let alone grow and prosper. CBA submits that Section 257 requires the Commission to do better. LPTV stations face market barriers that in some cases are overwhelming. Now is the time for the Commission to remove those barriers.

2. Section 257 Mandate. As stated in the *NOI*, Section 257 of the Communications Act of 1934,^{3/} as amended by the Telecommunications Act of 1996,^{4/} requires the Commission to conduct a proceeding "for the purpose of identifying and eliminating, by regulations..., market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."^{5/} In doing so, the Commission must "promote the policies and purposes of this Act favoring a diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity."^{6/} However, before new rules may be adopted to promote the interests and involvement of small businesses in the telecommunications marketplace, the term "small business" must be defined.

3. Definition of Small Business. The Commission seeks comment in this proceeding on whether the SBA's definition of a small business should be modified to reflect more adequately the kinds of telecommunications entities that should qualify for treatment as small businesses

^{3/} 47 U.S.C. §257.

^{4/} Pub. L. No. 104-104, 110 Stat. 56 (1996).

^{5/} 47 U.S.C. §257(a).

^{6/} 47 U.S.C. §257(b).

under the Commission's Rules. The statutory definition in the Small Business Act, 15 U.S.C. § 632, is discussed at footnote 2, *supra*. In addition, in order to qualify as a small business concern under the SBA's regulations, a television broadcasting entity must have no more than \$10.5 million in annual receipts.^{7/} This definition of a small business applies unless an agency such as the Commission, after consultation with the SBA and after opportunity is given for public comment, establishes one or more definitions that are appropriate to the activities of that agency and publishes that definition in the *Federal Register*.^{8/}

4. While the Commission has suggested that the SBA's definition of a small business overstates the number of television stations that should be considered small businesses,^{9/} it has not adopted an alternative definition to date; so the SBA's revenue threshold remains in effect as part of the definition of a small television business. The Commission has also recognized that all, or virtually all, LPTV stations have annual revenues of less than \$10.5 million and so qualify as small businesses. Thus every participant in the LPTV industry should be deemed a "small business" and is affected by the Commission's small business policies.^{10/}

^{7/} 13 C.F.R. §121.201.

^{8/} 5 U.S.C. §601(3).

^{9/} *Advanced Television Systems, Sixth Further Notice of Proposed Rule Making*, MM Docket No. 87-268, FCC 96-317 (rel. August 14, 1996), Appendix C, page 2.

^{10/} CBA is not aware of any LPTV station that could conceivably be considered "dominant in its field of operation"; and to CBA's knowledge, virtually all LPTV stations should be deemed "independently owned and operated." While some parties own more than one LPTV station, there are few, if any, entities that own more than a few LPTV stations and are major television industry players; and the economic position of those who may be considered major players is not based on their LPTV interests.

5. LPTV as the Classic Example of Small Business. The elimination of market entry barriers for entrepreneurs and small businesses required by Section 257 is a goal that the Commission has professed to embrace for many years. It is important to note that the underlying momentum behind the effort to accommodate small businesses under Section 257 must be, *inter alia*, to favor the diversity of media voices and promote the public interest, convenience and necessity.

6. In the *NOI*, the Commission rightfully recognizes the “significant role” that small businesses play in the U.S. economy, and sets forth SBA information showing that small businesses “constituted the vast majority of all employers, employed 53% of the private work force, and provided 50% of all receipts.”^{11/} Furthermore, in one of the most important statements made in the *NOI*, the Commission confirms what many in the LPTV industry have known and practiced for years: “[S]mall businesses are able to serve narrower niche markets that may not be easily or profitably served by large corporations, especially as large telecommunications expand globally.”^{12/}

7. In sum, LPTV stations fulfill all of the criteria for small businesses, and their activities promote all the goals that the government seeks to achieve:

a. They are independently owned and operated. In fact, operation and management by equity owners is a hallmark of the LPTV business.

b. They are not dominant in the video services field, or even in the television broadcasting segment of that field.

^{11/} *NOI* at ¶6.

^{12/} *Id.*

c. Their annual receipts are modest and rarely, if ever, exceed \$10.5 million at any station.

d. They strongly contribute to the diversity of the nation's media voices, serving smaller geographic communities that have no other local television service, as well as niche minority and other specialized audiences in larger markets.

e. LPTV stations are actively creating new jobs, including many at the all-important entry level where new careers begin. They stand in stark contrast to the wave of full power station mergers, which are resulting in massive lay-offs. See *"Staffs pay price for big-ticket mergers," Broadcasting and Cable Magazine*, Sep. 2, 1996, at p. 14.

f. CBA suggests that there is yet another factor that underscores the extent to which LPTV stations are truly small businesses -- they are rarely able to obtain conventional bank financing and have been financed largely by owner equity,^{13/} a factor that significantly limits their size.

8. Despite the clear beneficial attributes of small business involvement in the economy and the recent rapid growth of the telecommunications market, CBA submits that true small businesses, particularly the LPTV business, have not been given the amount of regulatory attention they deserve and Section 257 requires and as a result have encountered unnecessary obstacles to the development of their businesses. The Commission attempts to explain this problem, at least in part, by noting the many challenges, both of a regulatory and non-regulatory nature, facing small businesses that wish to enter the telecommunications marketplace, the most prominent of which is gaining access to adequate capital investment necessary to obtain a license and start up a telecommunications enterprise. Clearly, as the *NOI* recognizes, small businesses

^{13/} Venture capital has been available on a very limited basis. Such capital is normally very costly compared to conventional bank financing.

often bring with them higher inherent risks than large entities, and thus, initial capital investment is more difficult to obtain. However, the Commission must realize that regardless of the financial and other non-regulatory hurdles facing small businesses, potential investors are even less likely to invest when regulatory hurdles accompany business risks and handicap an enterprise. Even though the Commission may have little, if any, ability to remedy the problems of the non-regulatory economic world, it can and should remove regulatory impediments where possible and should not hesitate to do so just because other hurdles also exist.

9. The Commission Must Act Now To Relieve Regulatory Burdens. CBA urges the Commission to take advantage of the mandate provided by Section 257 to take strong action to open telecommunications markets to true small businesses, including the LPTV industry. While the Commission has expressed its concern on occasion regarding the preservation of the LPTV industry, it must follow through by implementing specific rules and policies that protect the interests of LPTV operators who provide direct local broadcast service to viewers in the communities they serve.

10. There are at least four areas where the Commission can and must do more to remove impediments to the development of small business LPTV enterprises:

a. In MM Docket No. 87-268, the Commission has spent many years of time and tens, if not hundreds, of thousand of dollars in government resources trying to find digital television channels for full power television stations. In the *Sixth Further Notice of Proposed Rule Making* in that proceeding,^{14/} the Commission expressed concern about the impact of its proposals on LPTV and invited the LPTV industry to suggest

^{14/} FCC 96-317, released August 14, 1996.

solutions. However, no government resources have been devoted to solving the LPTV problem; only large television businesses have received such assistance. It is time now to help LPTV stations, including by affirmatively searching for engineering solutions and by not cropping off large chunks of the TV spectrum for auction to wealthy entities before its usefulness to help displaced LPTV stations has been exhausted.

b. In MM Docket No. 92-266 and CS Docket No. 96-60, the Commission has advanced some constructive proposals for improving the rules regarding leased access on television. However, the pace at which the proceeding has been conducted has been painfully slow, stimulating repeated attempts to obtain relief in the Court of Appeals by way of the extraordinary remedy of a writ of *mandamus*.^{15/} Meanwhile, cable companies have strangled LPTV operators who do not have must-carry rights and are unable to purchase cable access because of prices that make no sense to any rational businessperson except one who is enriched by blocking access by outsiders to his or her channels. While Congress has made it clear that it intends that channels be made available for lease and that cable operators have no editorial control over those channels, the Commission has repeatedly expressed concern over the possible "economic impact" of leased access on one of the nation's heaviest positive cash flow telecommunications industries, while the small business entities for whom Congress intended to provide statutory relief are left to wither.

^{15/} The judicial proceedings have been brought by ValueVision. CBA filed a pleading with the court in support of ValueVision.

c. LPTV entities are permitted to file applications for new stations and major changes only during designated filing "windows." While the LPTV industry has repeatedly requested more windows, there has been no more than one per year, and there was none at all in 1995. During the two-year period between 1994 and 1996, the approximately one thousand proposals to improve LPTV facilities received in 1996 were blocked, preventing stations from remedying coverage defects and preventing many from being constructed at all. The Commission appears unable to accept and process LPTV applications more often because it does not have the "resources" to do so; but resources always seem to be available when prompt action is needed to expedite approval a mega-merger, especially when it involves a network or other giant entity. As always, it is a question of priorities; and CBA submits that some adjustment of priorities in favor of small business entities is needed.

d. Access to key policy personnel at the Commission is also an important issue. The Commission has twice recently excluded the low power television industry from public meetings where issues critical to the entire broadcast industry were discussed. These meetings were the *En Banc* hearing on spectrum policy and the panel that debated whether broadcast networks should be able to grant free air time to major political candidates without incurring equal time obligations to minor candidates. LPTV was deeply involved in the issues discussed at both of these meetings. As discussed above, the entire existence of the LPTV industry is threatened by the Commission's spectrum policy to recoup as much spectrum as possible for immediate auctioning. And with regard to political time, many LPTV stations provide far more air time to national and

local public officials and candidates than their full power counterparts. Yet while the National Association of Broadcasters was invited to participate in both meetings, formal, written requests to participate by CBA were rejected, and no other LPTV representative was included. Thus an industry that represents more licensed stations than the full power industry and has at least as much at stake was not heard during vital Commission deliberations.^{16/}

11. The Commission's Recent Small Business Focus Has Been Off the Mark. The examples throughout the *NOI* of the Commission's efforts in promoting the involvement of small businesses in the field of telecommunications are admirable on paper, but many of them do not involve the kind of "small business" that Congress had in mind when it created the SBA and passed small business legislation. For instance, pursuant to Section 309(j) of the Communications Act,^{17/} the FCC established competitive bidding rules and other provisions for Personal Communications Services ("PCS"), supposedly to ensure that small businesses and other "designated entities" have an opportunity to participate in the wireless communications industry. However, the qualifications of several of the largest C-block PCS license winners, such as NextWave Personal Communications, Inc., Merotel Communications, L.P., PCS 2000 Inc., and Pocket Communications, have been called into question by entities alleging that those

^{16/} Personal interaction with the Commissioners is a vital element of the agency's decision-making process. Written submissions are valuable but are not an adequate substitute for face-to-face contact. It is a painful and lengthy process -- and often unsuccessful -- for an LPTV entity to obtain an appointment to see a Commissioner personally. Nevertheless, when a mega-merger is proposed, the trade press always reports that the principals have paid "courtesy calls" on the Commissioners within a few days after the merger announcement. Better access leads to better understanding, and better access for the LPTV industry is needed.

^{17/} 47 U.S.C. §309(j).

entities, through attribution, exceed the maximum amount of gross revenues and total assets allowed in order to participate in the auction designed to encourage participation by small businesses and other designated entities.^{18/}

12. NextWave purchased 56 licenses in the auction for a total bid price of \$4.2 billion. The proposition is very simple: Any entity that can spend \$4.2 billion for anything is not a small business within any common sense interpretation of the criteria discussed at Par. 3, *supra*. It does not matter if the entity has zero revenue. It is not "small," period. The Commission cannot claim compliance with Section 257 or advancement of its goals based on that kind of result.

13. *Communications Daily* reported on its July 2, 1996, that 18.9% of all mergers and acquisitions in the first half of 1996 took place in the communications industry, with the broadcasting industry ranking third in such transactions.^{19/} The value of all such communications mergers during that time period totaled \$40.7 billion, a tremendous leap from \$3.9 billion a year earlier.^{20/} Specifically, the broadcasting industry figures rose a full 70% over last year's figure of \$8.9 billion.^{21/} While such vast growth in the industry is not undesirable *per se*, it does nothing at all to advance the cause of small business. In fact, to the

^{18/} See *Communications Today* (Phillips Publishing), July 3, 1996, and *Telecommunications Reports*, July 8, 1996 at p. 7. In order to qualify for the C Block PCS auction, an entity could not have gross revenues in excess of \$125 million per year, with combined attributable assets not to exceed \$500 million. These thresholds standing alone, even if an entity complied with them, do not represent "small business" in the way that any layman could conceivably understand that term.

^{19/} *Communications Daily*, July 2, 1996, p. 5.

^{20/} *Id.*

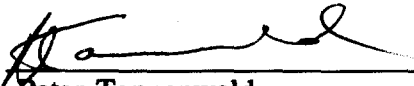
^{21/} *Id.*


contrary, as the nation's radio and television industries consolidate, small businesses are being driven out at a record pace and may not survive at all.

14. Conclusion. So far, the "small business" legacy of this Commission legacy appears to have been focused on billion dollar auctions and multi-million dollar mergers. The Commission must stand back and see the forest as well as the trees and recognize that the job it has been assigned by Congress is far from done. A reorientation is needed to fulfill the intent of Congress. LPTV is an excellent, if not the best, place to start.

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Respectfully submitted,


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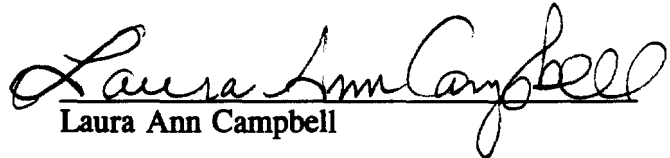
September 13, 1996

CERTIFICATE OF SERVICE

I, Laura Ann Campbell, do hereby certify that on this 13th day of September, 1996, I have served a copy of the "Comments of the Community Broadcasters Association" by hand delivery upon the following:

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